

Summary: The defendant filed a motion for habeas corpus relief under 28 U.S.C. § 2255, arguing that he had received ineffective assistance of counsel and that the Court had violated his rights. The Court dismissed the motion, finding that the defendant failed to show that defense counsel's performance was deficient or, if defense counsel was deficient, that the defendant's defense was prejudiced. Further, the defendant failed to show that the Court made a constitutional or jurisdictional error, or that there was a complete miscarriage of justice.

Case Name: USA v. William Dean Sandland

Case Number: 1-07-cr-100

Docket Number: 55

Date Filed: 6/19/09

Nature of Suit:

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION**

United States of America,)	
)	
Plaintiff,)	ORDER DISMISSING DEFENDANT'S
)	MOTION FOR HABEAS CORPUS
vs.)	RELIEF UNDER 28 U.S.C. § 2255
)	
William Dean Sandland,)	
)	Case No. 1:07-cr-100
Defendant.)	
_____)	
)	
William Dean Sandland,)	
)	
Petitioner,)	
)	
vs.)	Case No. 1:08-cv-106
)	
United States of America,)	
)	
Respondent.)	

Before the Court is the Defendant's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody filed on December 16, 2008. See Docket No.

39. The Court reviewed the motion and on December 22, 2008, ordered the Government to file a response. See Docket No. 43. The Government filed a response in opposition to the motion on February 5, 2009. See Docket No. 51. The Defendant filed a reply brief on February 23, 2009. See Docket No. 53. The Court dismisses the motion for the reasons set forth below.

I. BACKGROUND

On December 6, 2007, the defendant, William Dean Sandland, was indicted on two counts. Count one charged Sandland with possession with intent to distribute 50 grams or more of a controlled substance and count two charged him with possession of a firearm by an unlawful user of a controlled substance. See Docket No. 11. The indictment included a forfeiture allegation in the amount of \$7,580.00 pursuant to 21 U.S.C. § 853. On February 14, 2008, a jury found Sandland guilty of both counts and found that Sandland was in possession of \$1,100.00 that was subject to forfeiture to the Government. The Court ordered that a Presentence Investigation Report (PSR) be prepared in advance of the sentencing hearing. The PSR recommended a base offense level of 26 based on evidence that Sandland had been in possession of approximately 58 grams of methamphetamine, and a two-level enhancement under Section 2D1.1(b)(1) of the United States Sentencing Guidelines (U.S.S.G.) for possession of a dangerous weapon during the course of the offense, for a total offense level of 28. Sandland objected to the two-level enhancement. A review of Sandland's criminal history resulted in a designation of criminal history category I.

The Court adopted the PSR at the May 16, 2008, sentencing hearing. An adjusted offense level of 28 and a criminal history category I resulted in an advisory sentencing guideline range of 78 - 97 months. The Court sentenced Sandland to 78 months of imprisonment on count one and 78

months of imprisonment on count two, to run concurrent. Sandland never appealed the conviction or the sentence imposed.

On December 16, 2008, Sandland filed a petition for habeas relief pursuant to 28 U.S.C. § 2255. See Docket No. 39. Sandland alleges defense counsel was ineffective for failing to do the following: (1) properly prepare for trial; (2) call expert witnesses to refute laboratory results; (3) request a professional investigator; (4) establish an entrapment defense and object to the lack of a jury instruction on entrapment; (5) move the Court for dismissal of the indictment; and (6) address the 18 U.S.C. § 3553(a) factors at sentencing. Additionally, Sandland contends that the Court erred by (1) failing to provide a jury instruction on entrapment; (2) prosecuting him for possession of a firearm by an unlawful user; (3) sentencing him based on a quantity of 63 grams of methamphetamine; and (4) failing to address the 18 U.S.C. § 3553(a) factors at sentencing.

II. STANDARD OF REVIEW

28 U.S.C. § 2255 authorizes a challenge by “[a] prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States.” “A motion made pursuant to 28 U.S.C. § 2255 requires a showing of either constitutional or jurisdictional error, or a ‘fundamental defect’ resulting in a ‘complete miscarriage of justice.’” United States v. Gianakos, 2007 WL 3124686, at *4 (D.N.D. Oct. 23, 2007) (quoting Davis v. United States, 417 U.S. 333, 346 (1974); Hill v. United States, 368 U.S. 424, 428 (1962)).

III. LEGAL DISCUSSION

A. INEFFECTIVE ASSISTANCE OF COUNSEL

An ineffective assistance of counsel claim is properly raised in a 28 U.S.C. § 2255 action. See United States v. Davis, 452 F.3d 991, 994 (8th Cir. 2006). To be eligible for habeas corpus relief on an ineffective assistance of counsel claim, the defendant bears the burden of satisfying the two-part test announced in Strickland v. Washington, 466 U.S. 668 (1984).

The defendant must first show that counsel's performance was deficient. Strickland, 466 U.S. at 687. Counsel's performance is deficient when it falls below an objective standard of reasonableness. Id. at 687-88; see Marcum v. Luebbers, 509 F.3d 489, 502 (8th Cir. 2007). To determine whether defense counsel satisfied the reasonableness standard, a court must "assess reasonableness on all the facts of the particular case," "view the facts as they existed at the time of counsel's conduct" and not in hindsight, and "evaluate counsel's performance with a view to whether counsel functioned to assure adversarial testing" of the prosecution's case. See Marcum, 509 F.3d at 502. Because of the inherent difficulties in evaluating defense counsel's conduct at the time of performance, there is a strong presumption that counsel's performance is reasonable and "might be considered sound trial strategy." Strickland, 466 U.S. at 689.

The defendant must then show that counsel's deficient performance prejudiced the defense. Strickland, 466 U.S. at 687. Prejudice is rarely presumed in ineffective assistance of counsel cases. Prejudice is presumed "when there has been a complete denial of counsel or a denial of counsel at a critical stage, when 'counsel entirely fails to subject the prosecution's case to meaningful adversarial testing,' or when even competent counsel could not be expected to be of assistance given the circumstances." Malcom v. Houston, 518 F.3d 624, 627 (8th Cir. 2008).

Sandland has failed to allege or present any conduct by defense counsel that would give rise to a presumption of prejudice. Therefore, to succeed on the ineffective assistance of counsel claims, Sandland must show that counsel's performance prejudiced his defense. "A showing of prejudice requires a determination by the court that 'there is a reasonable probability [sufficient to undermine confidence in the outcome] that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" United States v. White, 341 F.3d 673, 677 (8th Cir. 2003) (quoting Strickland, 466 U.S. at 694).

The standard set forth in Strickland requires that judicial scrutiny of defense counsel's performance be highly deferential. "It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689.

The threshold issues before the Court are whether defense counsel's performance was deficient and, if so, whether such deficiency prejudiced Sandland's defense.

1) DEFENSE COUNSEL'S PREPARATION FOR TRIAL

Sandland contends that defense counsel was ineffective for failing "tantamountly in preparing for Trial Defense Counsel spent very little time with the Defendant prior to Trial, to prepare the Petitioner of Defense Team for Trial." See Docket No. 40 (errors in original). Sandland also contends that "defense counsel, failed to file proper pre-trial motions, to dismiss the firearms charges, motions to suppress, etc." See Docket No. 53 (error in original). Sandland has failed to

present any evidence to support this generalized claim. Instead, in a portion of his Section 2255 motion entitled “Restatement Of The Case,” Sandland states the following:

6.) Upon the Petitioner retaining his private attorney, attorney Hoffman, came to the County Jail, to visit the Petitioner, and reviewed the Discovery Evidence, Statements and Allegations, the Governments alleged evidence against the Petitioner.
7.) Thus, the Petitioner, and Defense Counsel decided to prepare, and proceed to Trial, upon the advise of the Petitioners Defense Counsel, Attorney Michael Hoffman.

See Docket No. 39 (errors in original). This “restatement of the case” directly contradicts Sandland’s claim that defense counsel was ineffective for failing to prepare for trial. Sandland contends that defense counsel did not properly prepare for trial yet he admits that defense counsel met with him to review the discovery evidence, statements, allegations, and the Government’s evidence against him. Thereafter, and based on a review of the evidence, defense counsel and Sandland decided to proceed to trial. Defense counsel also filed a motion in limine on February 5, 2008, in which he moved to exclude evidence of the purchase of controlled substances from Sandland on November 27, 2007, Sandland’s admission of “I sell,” and allegations made by witnesses pertaining to Sandland’s drug dealings. See Docket No. 20. Defense counsel (Michael Hoffman) is an experienced trial attorney. It is clear from the record that Hoffman was prepared for trial. Viewing the facts as they existed at the time, the Court finds that defense counsel was not deficient in preparing for trial.

Even if defense counsel’s preparation for trial was deficient, Sandland has failed to show how counsel’s performance prejudiced the defense of the case at trial. Sandland has failed to demonstrate a reasonable probability that the verdict would have been different had defense counsel more

thoroughly prepared for trial. Regardless of defense counsel's level of preparation, suffice it to say that there was overwhelming evidence of Sandland's guilt presented at trial. Further, defense counsel undertook all reasonable efforts to subject the government's case to meaningful adversarial testing.

2) FAILURE TO CALL EXPERT WITNESSES

Sandland argues that defense counsel was ineffective for failing to call expert witnesses at trial "to refute lab results to the Governments experts, toward forensic reports, or test . . . toward drug weights, or authenticity." See Docket No. 40 (errors in original). Sandland adds that "Defense Counsel, failed egregiously, to challenge the lab reports, by expert testimony of his own Defense Team, or to require the actual appearance of the Lab Technician, so as to determine the exact true and attest, amount of (methamphetamine)." See Docket No. 40 (errors in original). Sandland further explains that he "had no opportunity to present a expert witness, regarding the actual drug quantity involved in the Petitioners Proceedings, or the opportunity to refute, or face a Lab Tech., Forensic Expert, toward actual quantity" See Docket No. 46 (errors in original).

Sandland has failed to identify any expert witnesses who would have testified about the laboratory tests of the methamphetamine, nor has he indicated what such an expert witness would have testified about at trial. See Lamar v. Graves, 326 F.3d 983, 986 (8th Cir. 2003) (holding that the state court reasonably concluded that the appellant's claim that trial counsel should have consulted with an expert failed because the appellant did not offer expert testimony to support the claim). There is no evidence presented that defense counsel failed to explore every possible expert witness who may have aided in Sandland's defense. The Court declines to secondguess defense

counsel's trial strategy. Viewing the facts as they existed at the time, the Court finds that Sandland's defense counsel was not deficient for failing to call expert witnesses to testify about the laboratory tests performed on the methamphetamine or the quantity of drugs involved.

Even if defense counsel was deficient for failing to call expert witnesses to testify about the laboratory tests performed on the methamphetamine, Sandland has failed to show how his defense was prejudiced at trial. Specifically, Sandland has failed to demonstrate a reasonable probability that the verdict would have been different had defense counsel called expert witnesses to testify about the laboratory test results. Further, there is no evidence that any expert witness would have testified favorably for Sandland. Sandland also informed the Court at the sentencing hearing that he had reviewed the PSR. See Docket No. 45, p. 4. The PSR revealed the drug quantities at issue and neither party objected to those factual findings. Id. In addition, there was overwhelming evidence of Sandland's guilt presented at trial.

3) FAILURE TO RETAIN A PROFESSIONAL INVESTIGATOR

Sandland contends that defense counsel was ineffective for failing to "retain a Professional Investigator, to interview the government witnesses, to challenge the witnesses credibility at trial, or to establish a better Defense for the Trial Counsel, or to obtain criminal background checks of witnesses, to impeach the witness." See Docket No. 40. Pursuant to 18 U.S.C. § 3006A(e)(1), counsel for an indigent defendant may obtain authorization from the trial court for investigative, expert, or other services by demonstrating that "(1) such services are necessary to mount a plausible defense, and (2) without such authorization, the defendant's case would be prejudiced." United

States v. Gilmore, 282 F.3d 398, 406 (6th Cir. 2002). Sandland has failed to present any evidence to demonstrate that a professional investigator was necessary to mount a plausible defense.

The Court finds that Sandland did not need an investigator to interview witnesses, challenge the credibility of witnesses at trial, establish a better defense, conduct background checks, or impeach witnesses at trial. These are all tasks that an experienced defense counsel such as the defendant's attorney, Michael Hoffman, is capable of performing. Sandland has also failed to present evidence that he requested that defense counsel seek authorization for an investigator. Viewing the facts as they existed at the time, the Court finds that defense counsel was not deficient for failing to retain an investigator.

Even if defense counsel was deficient for failing to retain an investigator, Sandland has failed to show how counsel's performance prejudiced the defendant at trial. Sandland has failed to demonstrate a reasonable probability that the verdict would have been different had defense counsel requested the services of an investigator. Further, as previously noted, there was overwhelming evidence of Sandland's guilt presented at trial.

4) ENTRAPMENT

Sandland contends that defense counsel was ineffective for failing “to establish a strong entrapment defense for the Petitioner” and for failing to object to the lack of a jury instruction on entrapment. See Docket No. 40. Sandland contends the following: ““The Petitioner, would testify, He tried to avoid the (C.I.) (Lisa Dogskin), a/k/a. Ireland, However, she persisted, and included the Petitioner. Constituting entrapment, violating the Petitioners 5th Amendment. Thus, to further strengthen the Petitioners claim of entrapment, the Government, makes a deal with a convicted Drug Dealer, Tim Burk and continues to induce the Petitioner, to break the Law. Whereupon, if no for the Government, the Petitioner would not have violated the Law,” See Docket No. 40 (emphasis and errors in original).

To demonstrate entrapment, the evidence must clearly show that a government agent originated the criminal design; the agent implanted in the mind of an innocent person the disposition to commit the offense; and the defendant then committed the criminal act at the urging of the government agent. United States v. Brooks, 215 F.3d 842, 845 (8th Cir. 2000); United States v. Kummer, 15 F.3d 1455, 1459 (8th Cir. 1994).

The record clearly reveals that Sandland was not an “innocent person” but instead was predisposed to engaging in the use and sale of street drugs independent of the government’s activities. At trial, law enforcement officers Jay McCrary and Brad Wojtylak testified that Sandland admitted to selling street drugs. Additionally, Sandland acknowledged that he has been a drug user for over twenty years. See Docket No. 40.

Sandland has failed to present any evidence that he was the victim of government entrapment. Sandland has also failed to demonstrate that he informed defense counsel before trial

that he was entrapped. It is unreasonable to expect defense counsel to present “a strong entrapment defense” when there was no evidence that a government agent implanted in Sandland’s mind the disposition to sell street drugs. It is also unreasonable to expect defense counsel to object to the lack of a jury instruction on entrapment when there was no reliable evidence that Sandland was entrapped. Viewing the facts as they existed at the time, the Court finds that defense counsel was not deficient for failing to present a “strong entrapment defense” and for failing to object to the lack of a jury instruction on entrapment.

More important, even if defense counsel was deficient for failing to present an entrapment defense and for failing to object to a lack of a jury instruction on entrapment, Sandland has failed to show how his counsel’s performance prejudiced his defense at trial. Regardless of which actions defense counsel could have arguably taken, they would have been unsuccessful given the lack of any evidence of entrapment.

5) DISMISSAL OF THE INDICTMENT

Sandland argues that defense counsel was ineffective for failing to move the Court for a dismissal of the indictment. See Docket No. 40. Sandland has failed to present any evidence to support this claim. Viewing the facts as they existed at the time, the Court finds that defense counsel was not deficient for allegedly failing to move for a dismissal of the indictment, and Sandland has failed to show how defense counsel’s performance prejudiced his defense at trial.

6) **18 U.S.C. § 3553(a) FACTORS**

Sandland contends that defense counsel was ineffective for failing to address the 18 U.S.C.

§ 3553(a) factors at sentencing. Sandland claims the following:

- 1.) The Petitioner is sole provider, and caregiver, to his wife, who is 68 years old, and in poor health, and lives alone. The Petitioner avers, his Defense Counsel failed, to present Doctor's Letters of support, that the Petitioner's wife, had a serious accident prior to sentencing, a heart-attack, and does not, and can not drive, and lives alone, and is approx. 75 miles from Medical help, and other mitigating factors. . . .all of which would Constitute a downward departure.
- 2.) The Petitioner avers, that Defense Counsel failed, to Motion the Court for an Evaluation, toward his addiction to drugs, to Motion the Court for a Rehab. verse, Prison. Emphasis: The Petitioner has been, a drug user for over 20+ years, without ever attending a rehab. Whereupon, if brought to the Courts attention, would have caused the Court to consider a downward departure, based on the fact, the Petitioner, had never been in any . . . type of serious trouble with the law before. i.e. **United States v. Mannino**, 212 F.3d 835, "Failing to raise sentencing issues, denied Defendant of effective "Assistance of Counsel."

See Docket No. 40 (emphasis and errors in original).

Contrary to Sandland's claims, the Court was made aware of the above-mentioned facts that could potentially impact Sandland's sentence. The PSR contained a multitude of facts which were never objected to by the parties and which addressed most of the 18 U.S.C. § 3553(a) factors. Sandland spoke at the sentencing hearing about his history of drug use. See Docket No. 45, pp. 14-16. Sandland informed the Court that he started using street drugs when he was approximately 40 years old because of personal issues. The PSR reveals that Sandland disclosed to the probation office that Enid Taken Alive, a woman with whom Sandland has had a long-term relationship, had extensive health problems, including diabetes, high cholesterol, and shoulder and neck pain. Defense counsel presented evidence relating to some of the 18 U.S.C. § 3553(a) factors in a

sentencing memorandum (see Docket No. 34) and the Court was aware of Sandland's drug history and family responsibilities. Viewing the facts as they existed at the time, the Court finds that defense counsel was not deficient in addressing the sentencing factors set forth in 18 U.S.C. § 3353(a).

Even if defense counsel was deficient, Sandland has failed to show how his defense counsel's performance prejudiced him with respect to the sentence imposed. Under the Sentencing Guidelines, "family ties and responsibilities are not ordinarily relevant in determining whether a departure may be warranted." U.S.S.G. §5H1.6. Further, Sandland was given the opportunity to explain his chronic history of drug abuse. Even if defense counsel was in some manner deficient for not presenting certain mitigating evidence to the Court, the Court was aware of the factual information identified by Sandland because it was contained in the PSR, and such information was considered in determining the sentence to be imposed.

B. TRIAL COURT

1) ENTRAPMENT INSTRUCTIONS

Sandland also argues that the Court erred in failing to submit a jury instruction on entrapment. However, he has failed to present any evidence in support of this claim. As stated above, Sandland has failed to present any evidence that he was the victim of government entrapment. It is well-established that a "district court has broad discretion in instructing the jury" B & B Hardware, Inc., v. Hargis Indus., Inc., 252 F.3d 1010, 1012 (8th Cir. 2001) (quoting Morse v. S. Union Co., 174 F.3d 917, 926 (8th Cir. 1999) (quoting Cross v. Cleaver, 142 F.3d 1059, 1067 (8th Cir. 1998))). It is unreasonable to expect the Court to provide a jury instruction on entrapment when there was no evidence that Sandland was entrapped nor any request for such an instruction. The

Court acted within its broad discretion by not submitting an instruction on entrapment to the jury. Sandland has failed to make a showing of a constitutional or jurisdictional error, or a fundamental defect that has resulted in a complete miscarriage of justice. Accordingly, the Court finds that Sandland's argument on this claim is devoid of merit.

2) PROSECUTION FOR POSSESSION OF FIREARM

Sandland contends that the Court erred in "Prosecuting the Defendant for 'Possession of a Firearm by an unlawful user of a controlled substance.' 18 U.S.C. 922." See Docket No. 40 (errors in original). Sandland has failed to present any evidence in support of this vague claim. It is the Government, not the Court, that prosecutes a defendant.

Count two of the indictment charged Sandland with possession of a firearm by an unlawful user of a controlled substance, in violation of 18 U.S.C. § 922(g)(3). Under 18 U.S.C. § 922(g)(3), it is illegal for an unlawful user of a controlled substance to possess a firearm. The elements of this crime were set forth in the final jury instructions: (1) the defendant was an unlawful user of a controlled substance; (2) while the defendant was an unlawful user of a controlled substance, he knowingly possessed a firearm or ammunition; and (3) the firearm or ammunition was transported across a state line at some time during or before the defendant's possession of it. See Docket No. 25. These elements were proven by the Government at trial by proof beyond a reasonable doubt.

The Government contends that Sandland may be mistaken as to the specific section of the United States Code under which he was prosecuted. Sandland appears to argue that he was wrongly prosecuted for being in possession of a firearm while engaged in a drug trafficking crime. 18 U.S.C. § 924(c) makes it a crime to use or carry a firearm during the commission of a drug trafficking crime

or in furtherance of such a crime. Sandland was charged with a violation of 18 U.S.C. § 922(g)(3) as an unlawful user of a controlled substance. Sandland received a two-level sentencing enhancement for being in possession of a firearm during the course of a drug possession offense.

Sandland appears to argue that he was not in possession of a firearm, as required by 18 U.S.C. § 922(g)(3), 18 U.S.C. § 924(c), and the application of a two-level sentencing enhancement.

The Court defined “possession” as follows in the final jury instructions:

The law recognizes several kinds of possession. A person may have actual possession or constructive possession. A person may have sole or joint possession.

A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it.

A person who, although not in actual possession, has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it.

If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint.

Whenever the word “possession” has been used in these instructions it includes actual as well as constructive possession and also sole as well as joint possession.

See Docket No. 25, p. 9.

At the time Sandland’s residence was searched, a firearm was found in the residence in close proximity to where methamphetamine, marijuana, and drug paraphernalia were found. This clearly falls within the broad definition of “possession” as set forth in the final jury instructions. There is no dispute that Sandland had constructive possession of the firearm. At the sentencing hearing, the Court cited the commentary to U.S.S.G. § 2D1.1(b)(1) in discussing the application of the two-level

sentencing enhancement for possession of a firearm in connection with drug trafficking activities.

The following comments reflect that discussion:

Well, I have considered not only the arguments of counsel, but the sentencing memorandum that was submitted by the defendant in this case. I've reviewed Section 2D1.1(b)(1) and the commentary to that section, which is found on page 146 of the sentencing guidelines. Commentary indicates that the adjustment should be applied if a weapon is present unless it is clearly improbable that the weapon was connected to the offense.

It's my finding by a preponderance of the evidence that the adjustment should be applied in this case for the following reasons. I would feel differently if this handgun was in the bottom of a dresser drawer or in a closet or in a box or in some sort of container that was away from where the drugs were located. I would rule differently if that was the case.

But it was sitting on top of a file cabinet where the drugs were located, where the money was located, where the digital scale was. I believe there was paraphernalia there as well. And to me, from what I remember from the testimony at trial, that's probably where most of the weighing and the sorting and the bagging and the transactions took place. It wasn't loaded, but I tend to agree with Mr. Emerson in the sense that it was there.

As I recall from the trial testimony, there seemed to be a lot of traffic going in and out of the home at times, drug trafficking traffic, so the presence of the gun in close proximity to the drugs is what tips the scale in my mind, at least from a preponderance of the evidence standard, and leads me to believe that the adjustment should apply in this case.

See Docket No. 45, pp. 9-10. The Court was persuaded by the fact that the firearm was found on top of a file cabinet in close proximity to where the street drugs were located, and concluded that the two-level enhancement under U.S.S.G. § 2D1.1(b)(1) should apply. See Docket No. 45, p. 10.

Regardless of whether Sandland contends that he was wrongly prosecuted under 18 U.S.C. § 922(g)(3), incorrectly contends that he was wrongly prosecuted under 18 U.S.C. § 924(c), or contends that the two-level sentencing enhancement should not apply, he has failed to make a showing of a constitutional or jurisdictional error, or a fundamental defect that has resulted in a

complete miscarriage of justice. Sandland has wholly failed to demonstrate that he was wrongly prosecuted for possession of a firearm while being an unlawful user of a controlled substance.

3) SENTENCE BASED ON THE QUANTITY OF DRUGS

Sandland argues that the Court erred in sentencing him based on a quantity of 63 grams of methamphetamine “when the Governments Lab Reports support a finding of only 25% pure (methamphetamine) which would support only approx. (15.3) grams of (methamphetamine) Thus, lowering the Defendants Offense Level greatly, Constituting the fact, the Defendant is illegally sentenced!” See Docket No. 40 (emphasis and errors in original).

At the sentencing hearing, the Court adopted the undisputed factual findings set forth in the PSR which established that Sandland was in possession of 58 grams of methamphetamine. As noted, neither party objected to the drug quantities. Sandland informed the Court that he had reviewed the PSR. See Docket No. 45, p. 4. The methamphetamine was determined to be approximately 25% pure and, therefore, approximately 15 grams of “actual” methamphetamine. The PSR established a base offense level of 26 with a two-level enhancement because of the firearm, for a total adjusted offense level of 28.

Pursuant to U.S.S.G. § 2D1.1(c)(7), an offense level of 26 is appropriate when there are at least 50 grams but less than 200 grams of methamphetamine, or at least 5 grams but less than 20 grams of “actual” methamphetamine. Therefore, regardless of whether Sandland possessed 15 grams of actual methamphetamine, or 58 grams of methamphetamine, or 63 grams of methamphetamine, his base offense level was 26 plus a two-level enhancement. The Court finds that the offense level was correctly calculated and Sandland was not illegally sentenced.

4) 18 U.S.C. § 3553(a) FACTORS

Finally, Sandland contends that the Court erred by not specifically addressing the 18 U.S.C. § 3553(a) factors in determining the sentence to be imposed. At the sentencing hearing the Court explained:

There has been a request to impose a variance or a nonguideline sentence. I'm aware of my discretion and authority to do that, but I decline to exercise that discretion and impose a sentence below the guideline – applicable guideline range. In making that determination I've considered not only the guidelines, but all of the factors that I'm required to consider in imposing sentence, as spelled out in 18 USC 3553(a). I'm familiar with each and every one of those factors. I consider them in every case that I'm confronted with, and I have considered each and every one of those factors in this case.

...

Again, I have considered the 3553(a) factors. I believe that the presentence report and the sentencing memorandums and the arguments of counsel have all addressed each of those factors in some form or fashion, and hopefully the sentence will deter any further criminal conduct, protect the public from further crimes. It will reflect the seriousness of the offense and promote respect for the law and hopefully provide the defendant with training and medical care and treatment in the most effective, efficient manner.

See Docket No. 45, p. 17. It is clear that the Court properly addressed the 18 U.S.C. § 3553(a) factors in determining the sentence to be imposed. The detailed factual information contained in the PSR addressed most, if not all, of the Section 3553(a) factors. Sandland has failed to make a showing of a constitutional or jurisdictional error, or a fundamental defect that has resulted in a complete miscarriage of justice.

IV. CONCLUSION

For the reasons set forth above, the Court **DISMISSES** the Defendant's habeas motion pursuant to 28 U.S.C. § 2255 (Docket No. 39). The Defendant's motion for hearing (Docket No. 54) is **DENIED AS MOOT**. In addition, the Court certifies that an appeal from the denial of this petition may not be taken in forma pauperis because such an appeal would be frivolous and cannot be taken in good faith. Coppedge v. United States, 369 U.S. 438, 444-45 (1962). Based on the entire record before the Court, dismissal of the petition is not debatable, reasonably subject to a different outcome on appeal, or otherwise deserving of further proceedings. See Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983). Therefore, a certificate of appealability will not be issued by this Court.¹

If Sandland desires further review of his 28 U.S.C. § 2255 petition, he may request the issuance of a certificate of appealability by a circuit judge of the Eighth Circuit Court of Appeals in accordance with Tiedeman v. Benson, 122 F.3d 518, 520-22 (8th Cir. 1997).

IT IS SO ORDERED.

Dated this 19th day of June, 2009.

/s/ Daniel L. Hovland

Daniel L. Hovland, Chief Judge
United States District Court

¹The Court of Appeals for the Eighth Circuit has opined that the district courts possess the authority to issue certificates of appealability under Section 2253(c). Tiedeman v. Benson, 122 F.3d 518, 522 (8th Cir. 1997).